STATE OF MICHIGAN

COURT OF APPEALS

HASTINGS MUTUAL INSURANCE, as Subrogee of JOHN LALONDE,

Plaintiff-Appellant,

v

GENERAL MOTORS CORPORATION and BOOKWALTER MOTOR SALES, INC.,

Defendants-Appellees.

UNPUBLISHED
March 29, 2005

No. 252427
Montcalm Circuit Court
LC No. 02-001265-CK

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

GRIFFIN, J. (*concurring*).

I concur and join in the lead opinion. I write separately to emphasize plaintiff's failure to sustain its evidentiary burden in opposing defendants' motion for summary disposition brought pursuant to MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999).

In opposing defendants' motion, plaintiff relied on the deposition testimony of its experts, Timothy Herndon and Ed Nightingale. Mr. Herndon testified that the vehicle fire was caused by an oil leak which occurred because of a valve cover gasket failure. Although the gasket failed, Mr. Herndon had no opinion whether the oil gasket was defective:

> *Q.* Now, I know we've discussed that you believe the fire was caused due to the valve cover gasket, a leak therein; is that correct?
>
> *A.* That's correct.
>
> *Q.* Do you attribute that to a defect of any kind?
>
> *A.* I'm not a design engineer. I attribute that the valve cover gasket was allowing oil to bypass. Why, I'm not a design engineer. I don't know why.
>
> *Q.* So you're not offering an opinion as to whether or not there was a design defect in that area of the truck?

A. No. I am an origin and cause expert.

Q. Just to get it on the record, you're also not offering opinion as to whether or not there was a manufacturing defect as to that area?

A. I'm an origin and cause expert.

Q. So can I take that as a no?

A. That would be no.

* * *

Q. In your opinion, if you have such an opinion, what did General Motors do wrong in the manufacturing or design of this truck that caused this fire?

A. I'm not – again, I'm not a design engineer. I simply explained how the fire started and why it started.

* * *

Q. But you have no opinion or evidence that GM's manufacture or design led to this fire?

A. I don't have an opinion about that, no. It may have, it may not have. I just did the fire investigation.

Plaintiff's other expert, Ed Nightingale, also expressed no opinion whether the vehicle possessed a defect when it left the possession of defendant General Motors:

Q. Do you know why the gasket failed?

A. No.

* * *

Q. Were you able to determine if the cause of the gasket failure existed in the truck at the time it left General Motors?

A. Not exactly, no.

Q. Were you able to determine if the cause of the gasket's failure existed at the time the truck left Bookwalter Motor Sales –

A. No.

* * *

Q. Would you state that that is a manufacturing defect, or a design defect, or something else?

A. Not really sure. Just know it failed.

The above testimony by plaintiff's experts supports the theory that the fire occurred because of a gasket failure; however, it provides no direct evidence that the gasket was defective when it left the possession of defendant General Motors. *Auto Club Ins Ass'n v General Motors Corp*, 217 Mich App 594, 605; 552 NW2d 523 (1996).

In addition, for the reasons stated by the majority, circumstantial evidence of a defect attributable to defendant General Motors may not be inferred under the authority of *Holloway v General Motors Corp Chevrolet Div*, 403 Mich 614; 271 NW2d 777 (1978), because the *Holloway* standards have not been satisfied.

Finally, because the vehicle fire was an isolated occurrence, the present case is distinguishable from *Computer Network v AM General Corp*, ____ Mich App ____; ____ NW2d ____ (2005) (Docket No. 248966, issued 2/24/05). In *Computer Network*, we held that multiple repairs within a short time period from the lease of the vehicle was circumstantial evidence that the vehicle was defective at the time it left the possession of the defendant manufacturer:

> [I]n view of the multiple repairs to the vehicle and the total days it was out of service, a genuine issue of material fact exists whether defendant AM General breached its implied warranty of merchantability. The seventeen repair visits needed within such a short time is circumstantial evidence that the vehicle was defective and not reasonably fit for its intended use when it left the possession of defendant AM General.

For these reasons, I concur in the affirmance of the summary disposition granted in favor of defendants.

/s/ Richard Allen Griffin